IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-864

CORPORATION FOR PUBLIC BROADCASTING, *Petitioner,*

v.

THE NETWORK PROJECT, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Corporation for Public Broadcasting requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 22, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix A) is reported at —— U.S. App. D.C. ——, 561 F.2d 963 (1977). The opinion of the United States District Court for the District of Columbia (Appendix B) is reported at 398 F. Supp. 1332 (D.D.C. 1975).

JURISDICTION

The judgment of the Court of Appeals (Appendix C) was entered on July 22, 1977. No petition for rehearing was filed. On October 26, 1977, a sixty-day extension of time to and including December 15, 1977 within which to petition this Court for a writ of certiorari was granted by the Chief Justice (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the court below erred in holding that, in the absence of "exceptional circumstances," a federal district court must exercise jurisdiction over federal pendent claims even though it has dismissed the federal claims conferring jurisdiction upon it prior to trial and before the investment of substantial judicial resources.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory and constitutional provisions are set forth in Appendix E. The provisions include 28 U.S.C. § 1331(a) as amended by P.L. 94-574, § 2, 90 Stat. 2721 (1976), 28 U.S.C. § 1337 (1970), 28 U.S.C. § 1361 (1970), 47 U.S.C. § 396(b) (1970) and Article III, §§ 1 and 2 of the United States Constitution.

STATEMENT OF THE CASE

The petitioner, Corporation for Public Broadcasting (CPB), is a private, non-profit District of Columbia corporation organized pursuant to the Public Broadcasting Act of 1967 for the purpose of facilitat-

ing the development of noncommercial, educational broadcasting in the United States. *See,* 47 U.S.C. §§ 396(a), (b), (g)(1) (1970). Under the authority granted it by the Act, CPB is engaged in funding the production and distribution of noncommercial programs and in other activities designed to further the growth of noncommercial, educational broadcasting.

On May 31, 1971, respondents, two organizations whose members include viewers of noncommercial television, various individual viewers, and three individuals who are writers, producers, or directors,[1] brought suit in the United States District Court for the District of Columbia against CPB, the Public Broadcasting Service (PBS),[2] and two executive department officials.[3] The complaint alleged that the defendants had engaged in activities violative of various provisions of the Public Broadcasting Act and the First and Fifth Amendments of the Constitution and sought both declaratory and injunctive relief against such violations. In addition, the three "writer-producer-director" respondents requested compensatory dam-

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[1] The respondents are The Network Project, the American Civil Liberties Union, eleven individual viewers (Henry Smith, Elizabeth Brydolf, Richard Wolf, James Hornback, Ted and Adeline Aidman, Arnold and Libbie Pritsker, Howard Jewel, Caroline and Aris Anagos) and three writers, producers and/or directors (Paul Jacobs, Saul Landau and John Kuney).

[2] PBS is a private, non-profit membership corporation comprised of virtually all the licensees of non-commercial, educational television stations in the United States.

[3] These officials were Dr. Clay T. Whitehead, former Director of the Office of Telecommunications Policy, and Patrick J. Buchanan, former Special Assistant to the President. The claims against these defendants were dismissed as moot and have no relevance to this petition.

ages for claimed injuries to their professional reputations and work-product. Jurisdiction for the action was asserted under 28 U.S.C. §§ 1331(a), 1337 and 1361.

CPB and PBS moved to dismiss the complaint. On July 23, 1975, before discovery had begun,[4] the District Court granted their motion. App. B at 25a-42a. The court first held that no private rights of action exist under the Public Broadcasting Act, and that, as a result, the complaint failed to state a claim under that statute for which relief could be granted. *Id.* at 32a-35a. In light of this determination, the court found it unnecessary to decide whether jurisdiction over a claimed violation of the Act would otherwise exist under 28 U.S.C. § 1337. *Id.* at 36a-37a. Turning to the constitutional claims, the Court held that the respondents had failed to establish the requisite jurisdictional amount of 28 U.S.C. § 1331(a) with respect to them, and therefore, that no jurisdiction existed under that provision. *Id.* at 37a-41a.[5] In addition, it concluded

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[4] Shortly after filing the complaint, respondents served discovery motions. However, respondents did not oppose the CPB and PBS Motions for Protective Orders pending the resolution of their Motions to Dismiss and no further efforts at discovery were undertaken.

[5] In other rulings not herein relevant, the Court held that the claims against the executive department officials were moot; that the "writer-producer-director" respondents had failed to state any actionable claims under the First and Fifth Amendments; and that no mandamus jurisdiction under 28 U.S.C. § 1361 could exist since neither CPB nor PBS were agencies of the United States. *Id.* at 28a-32a, 40a, n.13 and 36a. Insofar as CPB was concerned, the latter ruling was based on 47 U.S.C. § 396(b) which specifically provides that CPB "will not be an agency or establishment of the United States Government."

that its disposition of the Public Broadcasting Act claims precluded § 1337 from operating as a basis for the exercise of pendent jurisdiction over the respondents' constitutional claims. *Id.* at 37a, n.9.

On appeal, the United States Court of Appeals for the District of Columbia Circuit concluded that no private right of action could be implied under the Public Broadcasting Act, and that the respondents' statutory claims had therefore been properly dismissed under Rule 12(b)(6), F.R. Civ. P. App. A at 16a-24a. However, the Circuit Court held that the District Court's jurisdiction to consider those statutory contentions under 28 U.S.C. § 1337 was sufficient to enable it to exercise pendent jurisdiction over the respondents' constitutional claims. *Id.* at 8a-15a. Rather than remanding the case to the District Court to permit it to decide, in its discretion, whether to exercise such jurisdiction, the Court of Appeals went on to hold that the District Court had abused its discretion in dismissing the constitutional claims. The controlling factor in this determination was the federal nature of the pendent claims. As the Court of Appeals stated:

> '[when] the claim involved . . . is one of federal law, the reasons for the exercise of pendent jurisdiction are especially weighty, and exceptional circumstances [are] required to prevent the exercise.'

Id. at 14a, quoting from *Rosado* v. *Wyman,* 397 U.S. 397, 425 (Douglas, J., concurring) (bracketed language in D.C. Cir. opinion). Finding no "exceptional circumstances" present, the Court reversed the dismissal of the constitutional claims and remanded them

to the District Court for disposition on their merits. App. A at 14a-15a.

REASONS FOR GRANTING THE WRIT

The District Court dismissed the federal claims conferring jurisdiction upon it at the earliest stage in the litigation process and before it had expended significant time or resources in their resolution. Nevertheless, the Court of Appeals held that the District Court abused its "discretion" in failing to exercise pendent jurisdiction over the respondents' constitutional claims which were otherwise beyond the scope of its congressionally limited jurisdiction. In so holding under these circumstances, the Court of Appeals, in effect, required a federal district court to assume jurisdiction over all pendent federal claims.[7] This decision flies in the face of prior decisions of this Court in the pendent jurisdiction area, conflicts in principle with the decisions of other Courts of Appeals, and raises pervasive questions concerning the constitutional power of federal courts to utilize the rubric of pendent jurisdiction to expand their jurisdiction beyond the limitations imposed upon them by Congress.

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[6] In view of its decision that the District Court had erred in failing to exercise pendent jurisdiction over respondents' constitutional claims, the Court of Appeals found it unnecessary to determine whether jurisdiction over those claims also existed under 28 U.S.C. § 1331(a) (1970). App. A at 8a, n.36.

[7] Although the Court of Appeals insisted that pendent jurisdiction is a doctrine of discretion, one is hard-pressed to imagine any situation where dismissal would be proper if the circumstances, "exceptional" or otherwise, here presented did not justify a refusal to exercise jurisdiction over respondent's pendent claims.

1. The decision below conflicts with this Court's fundamental decision on pendent jurisdiction, *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966). That decision, reaffirmed by the Court only one year ago in *Aldinger* v. *Howard,* 427 U.S. 1 (1976), emphasized that the doctrine of pendent jurisdiction was one of "discretion, not of plaintiff's right". 383 U.S. at 726. That discretion was not without bounds. Recognizing that the doctrine represented an expansion of federal jurisdiction, the Court held that even when a federal court otherwise possessed the "power" to assume jurisdiction over pendent claims, that power was qualified by "considerations of judicial economy, convenience and fairness to litigants; if these are not present, a federal court should hesitate to exercise jurisdiction." *Id.* The Court went on to note that such considerations were absent when the jurisdiction conferring claims were dismissed prior to trial. As the Court stated: "Certainly, if the federal claims are dismissed before trial, . . . the state [pendent] claims should be dismissed as well." *Id.*

The court below disregarded this aspect of *Gibbs* because the respondents' pendent claims were federal, rather than state, in nature. Apparently, it believed that "the special competence of federal courts to adjudicate" such claims outweighed the "considerations of judicial economy, convenience and fairness" which underlie a proper exercise of pendent jurisdiction and made any inquiry into them unnecessary.[8] This view

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[8] While the Court of Appeals agreed that considerations of "judicial economy, convenience and fairness" provide the justification for the doctrine of pendent jurisdiction, its opinion reflects no examination of such factors.

finds no support in either *Gibbs* or the recent decisions of this Court.

Gibbs recognized that a pendent state claim could be "closely tied to questions of federal policy" and, indeed, found the claim there involved to be of that nature. *Id.* at 727-29. However, while noting this factor as one favoring the exercise of pendent jurisdiction, the decision did not hold it to be dispositive. Rather, it was listed as only one consideration to be weighed in determining whether an assertion of such jurisdiction was appropriate. Hence, *Gibbs* contains no intimation that the discretionary considerations it outlined to govern the exercise of pendent jurisdiction are wholly inapplicable when the pendent claims involve federal law.[9] In view of the nature of the claim there involved, quite the opposite is true.

Moreover, even though a federal court's assertion of jurisdiction over pendent federal claims normally does not infringe upon the "comity" and "federalism" interests which provide a partial basis for the *Gibbs* rationale,[10] there are equally compelling considerations counseling against an indiscriminate exercise of pendent jurisdiction. Those considerations, which underscored the Court's recent refusal to permit the pendent party jurisdiction asserted in *Aldinger*

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[9] The Chief Justice, and Justices Powell and Rehnquist have explicitly rejected any notion that these considerations are inapplicable in the pendent federal claim context. *See* Hagans v. Lavine, 415 U.S. 528 (1974) at 550 (Powell, J., dissenting, joined by the Chief Justice and Rehnquist, J.) and 557-62 (Rehnquist, J., dissenting, joined by the Chief Justice and Powell, J.).

[10] This may not always be the case. *See*, Hagans v. Lavine, 415 U.S. at 558-59 (Rehnquist, J., dissenting, joined by the Chief Justice and Powell, J.).

v. *Howard, supra,* are grounded in the constitutional principle that federal courts are "courts of limited jurisdiction marked out by Congress." 427 U.S. at 15. However, the court below, in concluding that the "special capability of federal courts to adjudicate federal claims" required federal court resolution of respondents' constitutional claims, found it irrelevant that Congress, through the amount in controversy requirement of § 1331(a), had expressly denied federal courts such jurisdiction. App. A at 15a, n.70. This jurisdictional limitation is in no way qualified by the "special competence" of federal courts in matters of federal law. Indeed, any such suggestion has been implicitly rejected by the recent decisions of this Court emphasizing, in a variety of contexts, that state courts are fully competent to adjudicate questions of federal statutory and constitutional law.[11] Hence, assuming *arguendo* that a federal court may, under certain circumstances, exercise pendent jurisdiction over federal claims expressly excluded from its jurisdiction by Congress, a proper sensitivity for the congressionally limited nature of federal court jurisdiction demands, at the very least, that such jurisdiction not be exercised where, as here, considerations of "judicial economy, convenience and fairness" are absent.

The cases relied on by the court below are inapposite. In *Rosado* v. *Wyman,* 397 U.S. 397 (1970), the Court upheld a district court's exercise of jurisdiction over a pendent Supremacy Clause claim after a jurisdiction

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[11] *See, e.g.,* Palmore v. United States, 411 U.S. 389, 401, 407 (1973); Steffel v. Thompson, 415 U.S. 452, 460-61, 462 (1974); Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975); Stone v. Powell, 428 U.S. 465, 494, n.35 (1976); Juidice v. Vail, 430 U.S. 327, 336 (1977); Trainor v. Hernandez, 431 U.S. 434, 443 (1977).

conferring equal protection claim was rendered moot following hearings and argument. The Court specifically found that the district court's actions served the considerations which underlie the doctrine of pendent jurisdiction—"the conservation of judicial energy and the avoidance of multiplicity of litigation".[12] *Id.* at 405. Indeed, it intimated:

> "no view as to whether the situation might have been different had the constitutional claim become moot before the District Court had invested substantial time in its resolution."

Id. at 404, n.4.

Likewise, in *Hagans* v. *Lavine*, 415 U.S. 528 (1974), which also involved a pendent Supremacy Clause challenge to a state statute, the jurisdictional constitutional claim was not dismissed at the outset of litigation. There, the district court, rather than convening a three-judge court, had found the constitutional claim "substantial" and proceeded to dispose of the case on the statutory, Supremacy Clause issue. In upholding the district court's actions, this Court emphasized that the assertion of pendent jurisdiction over the Supremacy Clause claim served the well-established policy of avoiding unnecessary resolution of constitutional questions.[13] *Id.* at 546-50. Moreover, by commending the

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[12] Indeed, in his concurring opinion, Justice Douglas emphasized that the prior proceedings had enabled the district judge to issue his preliminary injunction opinion without "further hearings or testimony." *Id.* at 425.

[13] Justice White, the author of *Hagans*, has stated that the decision was "premised on what has come to be known as the rule of necessity, of avoiding resolution of controversies on constitutional grounds where possible." Mayor of Philadelphia v. Educ. Equality League, 415 U.S. 605, 635-36 (dissenting opin.).

district court for making a three-judge court unnecessary at a time when court calendars were already seriously overcrowded, the Court implicitly found that its actions furthered "judicial economy" considerations. *Id.* at 543-45. Hence, not only does *Hagans* fail to speak to the issue presented in the instant case, *i.e.*, the pre-trial dismissal of a jurisdiction conferring claim, the policy considerations on which it was grounded are totally absent."

2. The decision below raises pervasive questions concerning the constitutional power of federal courts to utilize the doctrine of pendent jurisdiction to expand their jurisdiction beyond the limits imposed upon them by Congress. Article III of the Constitution grants Congress the authority not only to establish lower federal courts, but also to define their jurisdiction. Normally, a federal court's exercise of pendent jurisdiction over state claims does not conflict with the congressional limitations imposed on its jurisdiction. *But see, Aldinger* v. *Howard, supra.* In such cases, Congress has usually been "silent on the extent to which the defendant, already properly in federal court under a statute, might be called upon to answer nonfederal questions or claims . . . ." *Id.* at 15.

However, such is not the case when the pendent claim is one of federal law. Indeed, there would be no need to utilize the doctrine but for the fact that Congress had specifically excluded the pendent claim from

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[14] Nor does Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) command a different result. In that case, the federal court had independent jurisdiction over the "pendent" claim; the only question was whether the court could resolve both the dominant and pendent claims in the same proceeding. *See,* Kurland, *The Romero Case and Some Problems of Federal Jurisdiction,* 73 Harv. L. Rev. 817, 833-50 (1960).

the scope of the court's jurisdiction. The party asserting the pendent claim thus finds himself in much the same predicament as the petitioner in *Aldinger*. As the Court stated:

> "Petitioner must necessarily argue that in spite of the language emphasized above [which excluded the pendent party from the scope of the jurisdiction conferred by 28 U.S.C. § 1343] Congress left it open for the federal courts to fashion a jurisdictional doctrine under the general language of Art. III enabling them to circumvent this exclusion . . . ."

Id. at 16. The Court there concluded that the congressional limitations imposed on federal court jurisdiction prohibited a federal court from exercising pendent party jurisdiction unless it was satisfied "that Congress in the statutes conferring jurisdiction [had] not expressly or by implication negated its existence." *Id.* at 18.

In the instant case, Congress has "expressly negated" federal court jurisdiction over respondents' pendent claims through the amount in controversy requirement of § 1331(a) which represents "a legislative decision to leave certain [federal] claims to state courts." *Hagans, supra* at 559 (Rehnquist, J., dissenting).[15] Assuming *arguendo* the propriety of ever as-

[15] In light of the recent amendment to § 1331 permitting suits against the United States, its agents, officers and employees, without regard to the amount in controversy, there can be no doubt that Congress intended to prohibit jurisdiction over respondents' claims. By excluding claims against such defendants from the amount in controversy requirement, Congress manifested its intent to require the jurisdictional amount to be satisfied in all other cases. CPB, of course, does not fall within the recent amendment. 47 U.S.C. § 396(b).

suming jurisdiction over such claims, this congressional exclusion would seem to call for a most restrictive and discriminating application of the pendent jurisdiction doctrine. Nonetheless, the Court of Appeals fashioned a pendent jurisdiction standard for federal claims that is far more permissive than that used in the state claim context.

In any event, while this Court has indicated that different considerations do inhere when the pendent claim is federal, rather than state, in nature,[16] it has never addressed the inherent conflict between a federal court's exercise of pendent jurisdiction over federal claims expressly excluded from its jurisdictional grant and Congress' power under Article III to define the jurisdiction of the federal courts. It is a conflict that needs to be resolved by this Court in order to remove the:

> "substantial danger that the idea of pendent jurisdiction . . . may be self-perpetuating, sustained by the redoubtable trappings of other jurisdictional or constitutional considerations, thereby overwhelming inherent federal court jurisdictional limitations."

Seid, *The Tail Wags the Dog: Hagans* v. *Lavine and Pendent Jurisdiction*, 53 J. Urban Law 1, 2 (1975).

3. Prior to the decision below, the Courts of Appeals have, with near universality, followed *Gibbs'* admonition that the dismissal of jurisdiction conferring claims prior to trial normally requires dismissal of pendent claims as well. *See, e.g., Sigmon* v. *Poe*, No. 76-1884 (4th Cir., Oct. 17, 1977); *Women in City*

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[16] *See, Hagans, supra* at 545-50.

Gov't United v. *City of New York*, 15 E.P.D. ¶7862 (2nd Cir. 1977); *Hodge* v. *Mountain State Tel. & Tel. Co.*, 555 F.2d 254 (9th Cir. 1977); *Kurz* v. *State of Michigan*, 548 F.2d 172 (6th Cir. 1977); *Stern* v. *U.S. Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977); *Briscoe* v. *Bock*, 540 F.2d 392 (8th Cir. 1976); *Tully* v. *Mott Supermarkets, Inc.*, 540 F.2d 187 (3rd Cir. 1976); *Brough* v. *United Steelworkers of Amer.*, 437 F.2d 748 (1st Cir. 1971). While there have been some departures from this rule of thumb, such departures have usually been specifically justified on grounds of "judicial economy, convenience and fairness to litigants." *See, e.g., Reiser* v. *Dist. of Col.*, 23 F.R. Serv.2d 1312, 1318 (D.C. Cir. 1977); *Kavitt* v. *A. L. Stamm & Co.*, 491 F.2d 1176, 1183-84 (2nd Cir. 1974); *Gray* v. *International Ass'n of Heat & Frost Insulators*, 447 F.2d 1118, 1120 (6th Cir. 1971)."[17] Indeed, a number of Courts of Appeals have held that when the jurisdiction conferring claim cannot withstand a pretrial motion to dismiss, the pendent claims should be dismissed in the absence of "exceptional circumstances" justifying a retention of jurisdiction. *See, e.g., Tully, supra*, at 196; *Nolan* v. *Meyer*, 520 F.2d 1276, 1280 (2nd Cir. 1975); *Kavitt, supra* at 1180. This rule is the exact opposite of that fashioned below.

While the decisions cited above all involved pendent state claims and thus are not in literal conflict with the decision below, the Court of Appeals' clear departure from the weight of existing precedent in a closely

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[17] Some courts appear more permissive than others in applying this standard and a conflict on this ground might also be asserted. *Compare* Gray, *supra* and Brunswick v. Regent, 463 F.2d 1205 (5th Cir. 1972) *with* Tully, *supra*. In any event, petitioner has not uncovered a single case in which pendent jurisdiction was found to exist under circumstances similar to those here presented.

analogous context can only breed confusion in the lower courts and therefore demands the attention of this Court. If federal pendent claims require such differing treatment, it is for this Court, rather than the Court of Appeals, to decide.

4. This case asks the Court to determine the circumstances, if any, under which a federal court may utilize the doctrine of pendent jurisdiction to exercise jurisdiction expressly denied it by Congress. It thus raises an important jurisdictional question which goes to the heart of the constitutional principle that federal courts are courts of congressionally limited jurisdiction. Moreover, the issue presented is "fundamental to the further conduct of the case." *Compare Land* v. *Dollar,* 330 U.S. 731, 734, n.2 (1947). Under these circumstances, the non-finality of the judgment below should not be viewed as a bar to a grant of certiorari. Indeed, this Court has granted certiorari in cases raising similarly important jurisdictional questions when a Court of Appeals has reversed the grant of a motion to dismiss and ordered the case remanded for trial. *See, e.g., Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682 (1949); *Land, supra.*

CONCLUSION

For all of the reasons stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated December 15, 1977